

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1332

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1332

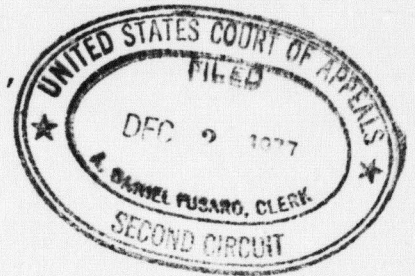
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,

Defendants-Appellants.



On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

ZVONKO BUSIC AND JULIENNE BUSIC

Of counsel:

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

MICHAEL E. TIGAR
PIERCE O'DONNELL
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Attorneys for Defendants-
Appellants Zvonko Busic
and Julianne Busic

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

ZVONKO BUSIC AND JULIENNE BUSIC

The defendants-appellants, Zvonko and Julie Busic, submit this brief in reply to the brief submitted by the plaintiff-appellee, United States of America. Several of the arguments advanced by the government were anticipated and addressed in the appellants' initial brief. However, the government has filed a 112-page brief containing numerous distortions of the record and inapposite legal argument. We believe that a dispassionate reading of the trial transcript and legal authorities relied upon

by the appellants will persuade the Court that the appellants' opening brief contains a far more objective statement of the evidence and law. Nevertheless, we are obliged to point out the government's more conspicuous misstatements and omissions. We are confident that the measured voice of reason will prevail over the government's shrill appeal to passion.

I.

THE GOVERNMENT HAS DISTORTED THE RECORD
THROUGH MISSTATEMENTS OF THE EVIDENCE
AND OMISSIONS OF CRITICAL TESTIMONY

One of the principal points urged by Julie Busic in the appellants' opening brief was the prosecutor's overzealous closing argument. We directed the Court's attention to his charges that the defense was fabricated and the defendants were lying, his misrepresentations of crucial testimony, and his expressions of opinion about Julie's guilt. See Brief for Appellants Zvonko and Julie Busic at 60-62 and Appendix D (hereinafter "Apps. Br."). Any doubt about these contentions is conclusively dispelled by the government's own brief.

In page after page, the prosecution, picking up where it left off in the trial court, warps the record through a skillful melding of unsubstantiated factual assertions and incomplete descriptions of the evidence. As the representative examples discussed below conclusively show, the government has not sought to take fair advantage of permissible inferences or to reasonably

cast the evidence in the light most favorable to its case. On the contrary, the government significantly exceeds the traditional bounds of fair argument of the facts.

Clarification of the record in Julie's case is of critical importance. Relying in part on the statements discussed below, the government argues that there was "hard evidence of [her] involvement" in the hijacking, she was "caught red-handed", and "she obviously participated in the hijacking." Brief for Plaintiff-Appellee at 20, 21, 42 (hereinafter "Gov. Br."). While we believe that the discussion below will show that the government's case against Julie was not as overwhelming as it suggests, it is imperative to point out that the government fails to appreciate the nature of Julie's defense. Julie defended the charges on the basis of her status as merely a knowing spectator and her lack of the requisite intent to plan or participate in the hijacking.^{1/} As we

^{1/} Judge Bartels recognized the validity of this defense in his jury instructions. For example, on the charge of aiding and abetting, he told the jury:

"Mere presence . . . at the scene of the crime, or mere knowledge that the crime is being committed is not sufficient to convict a defendant. The burden is upon the Government to prove beyond a reasonable doubt that, one, first there was a principal offense committed by a defendant or defendants, and two, a particular defendant wilfully aided and assisted in its commission and failure of the Government to make such proof is fatal to the prosecution" Joint Appendix at 609-10 (hereinafter "App.>").

summarized in our opening brief:

"Julie Busic did not deny that she accompanied her husband on Flight 355 or that she remained by his side during the 31-hour ordeal. She did assert, however, that she did not intend to participate in a hijacking and that she had not done so.

* * * * *

"Julie never made a conscious decision to accompany Zvonko on the flight. (T. 3591). She was frightened for her husband, and she was frightened for herself. She feared she would never see Zvonko again. (T. 3590).

* * * * *

"Once aboard, Julie never became part of the hijacking. She was surprised when she learned of Zvonko's take-over of the plane, and she tried to persuade him to surrender. (T. 3055) Throughout the seizure of Flight 355, Julie was helpful and a calming influence. She never carried a weapon and never yelled at or harrassed anyone. (T. 1686-87)" Apps. Br. at 13-16.

In light of this defense, the government's unsubstantiated suggestions that Julie had previous knowledge about the details of her husband's plans and that she played a pivotal role in their implementation take on great significance. The most glaring of these direct allegations and insinuations must therefore be exposed. To facilitate comprehension of the complex and at times confusing facts, we have arranged these representative examples in chronological order.

1. Julie's February, 1976 Trip to the Library

In her direct testimony, Julie freely admitted that at Zvonko's request she had accompanied him to the public library. Zvonko had initially asked her to find some international law on hijacking. (T. 3533). He later asked her to find "books describing what airplanes look like . . . , how far they could go . . . [and] if it was possible to throw leaflets out . . . while the plane was up in the air." (T. 3538). Julie found Jane's All the Worlds Aircraft, and she left Zvonko with the book while she went off to work. (Id.)

The following day Zvonko showed her photocopies of a Boeing 727 (Gov. Exh. 40) that he had made from the book. (T. 3540-41). Alarmed by Zvonko's interest in this subject matter, Julie grilled him, but he reassured her that he intended nothing unlawful. (T. 2887-88). The subject was dropped and nothing remotely related to it was discussed until a few days prior to the hijacking. (T. 3554). See Apps. Br. 13-14.

In its brief, the government states that Julie "went to the library . . . to help find a plane that had windows from which leaflets could be dropped" (Gov. Br. 32 n.23).^{2/} From the testimony cited in the two preceding paragraphs, it is abundantly

^{2/} See also Gov. Br. 21 (Zvonko admitted that Julie "helped him with the initial research in discovering the type of plane from which leaflets could be dropped"); Gov. Br. 21 n.12 ("Mrs. Busic discovered that a Boeing 727 was the only one that had windows that could be opened (Tr. 3542)").

clear that Julie went to the library for no such purpose. Moreover, any inference to this effect flies in the face of Julie's uncontroverted testimony that she had no knowledge or even inkling in February 1976 that her husband was contemplating such an action. Any such suggestion is also contrary to Zvonko's own uncontradicted testimony that he never told Julie the reason he was looking for the information at the library, had not decided by February, 1976 to hijack a plane, and never told her anything about a possible hijacking until a few days before the event. (T. 3009, 2887-88). Accordingly, Julie's library trip cannot, as the government suggests, support the proposition that Julie played a knowing role in Zvonko's preparatory activities.

2. Julie's Prior Knowledge About Hijacking

Julie testified that when she boarded Flight 355, she "knew that [Zvonko] was contemplating hijacking the plane." (T. 3634)(emphasis added). Zvonko had previously testified that he had

"never directly told her that I planned to hijack an airplane but I did tell her [the] previous week that . . . we were going to fly to Chicago and she was aware that I printed leaflets explaining the Croatian political situation and I told her that I had some kind of idea of trying to throw these leaflets through the windows, out before we land in Chicago and if I don't succeed in that I might talk to the pilot and try to convince him to let me do it or something on that subject." (T. 2888-88a; see also T. 3080-82).

Zvonko further explained that he told Julie nothing more than these vague plans because "she would question, give me a million questions and give me just a headache about it and besides I was afraid if she finds out about, exactly what I was doing or planning, she might get scared" (T. 2911) (emphasis added).

In support of its argument that Julie was defenseless at trial, the government contends that Julie "was aware prior to boarding the plane . . . that her husband intended to hijack the plane (T. 3634)" (Gov. Br. 21) (emphasis added). As the foregoing testimony establishes, this statement is supported by neither the referenced transcript page nor any other evidence. Julie admitted only that Zvonko had told her that he was "contemplating" a hijacking and not that he actually "intended" such action. This distinction -- critical to Julie's knowing spectator and lack of intent defense -- is obliterated by the government. Moreover, Zvonko's testimony explaining why he did not tell Julie "exactly what I was doing or planning" (T. 2911) rebuts any suggestion that Julie boarded the plane knowing that Zvonko would in fact attempt to commandeer the aircraft. Finally, the testimony clearly shows that Julie was surprised when she learned of the takeover and that she tried

to persuade him to surrender. (T. 3055).^{3/}

3. Julie's Involvement With the Bomb

a. Julie's Fingerprints
on Documents in Locker

Julie and Zvonko testified that she never knew that Zvonko had purchased dynamite nor that he had constructed and planted a live bomb. (T. 2895, 2906, 3151, 3596-97). The government offered no direct testimony that Julie had any such involvement with the live bomb. The government did introduce documents found with the bomb in the Grand Central station locker which contained Julie's fingerprints, including the "demand note" with the reference to "a second timed explosive device" (Gov. Ex. 19) (T. 3493).

The government relies heavily upon Julie's fingerprints on these documents, and particularly the "demand note", in arguing that the government's direct case against Julie was overwhelming and that the unlawful admission of the contents of her flight bag

^{3/} The government accuses (Gov. Br. 42) appellants of making the following statement in their brief "unaccompanied by a reference to the record": "the jury heard testimony from several witnesses about Julie's repeated efforts to persuade Zvonko to surrender" Apps. Br. 18 (emphasis added). We readily acknowledge that the quoted sentence was not followed by a citation to the record. What the government ignores, however, is that the sentence summarized previously described citations to the testimony of Zvonko (T. 3055), a passenger, Walter Rush (T. 3467, 3471), and Julie (T. 3614-15). See Apps. Br. 15, 16.

was therefore harmless error. Gov. Br. 42; see also id. at 18, 21, 67. The government fails to mention, however, another substantial segment of Julie's testimony in which she explained in detail the presence of her fingerprints on these documents.

The record clearly shows that, during the week before the hijacking, Julie discovered the demand note on Zvonko's desk in their apartment. The reference to an explosive device made her "really upset." (T. 3596). She confronted Zvonko. He refused to answer her questions but assured her that

"I never hurt anybody and I'm opposed to violence and I wouldn't do anything to hurt -- hurt or put any people in danger and don't ask me any more questions because I'm not going to talk about it." (T. 2596).

Julie tried to persuade Zvonko to abandon his notions about throwing leaflets out of a plane. (T. 3078-82). As Zvonko related on cross-examination, Julie was rebuffed:

"When she asked me how that was and I refused to give her any clear answers about this particular act, and she started to cry and said, what she was supposed to do, I said, 'You are on your own. I had decided to do this, and you know me, nobody in the world can convince me otherwise.'" (T. 3082).

Uncertain of Zvonko's exact plans and "confronted with a situation that [she] was not strong enough to handle", Julie followed her husband. (T. 3590). When she boarded the plane, however, she did not "get on with the idea of helping [her] husband carry out his plans." (T. 3597).

b. Statements in Paris

In one of the more serious mischaracterizations of the evidence, the government suggests that when Julie spoke with Zvonko from the Charles de Gaulle Airport tower, she confirmed her role in placing the live bomb in the Grand Central Station locker.

"[A]t about 11:00 P.M. (E.D.T.), Mrs. Busic's voice finally came over the radio (Tr. 1620). Their mission had been a success, and their message had been published by the major American newspapers. There had been one hitch. The bomb they planted at Grand Central Station had exploded and killed a member of the New York City Bomb Squad, Brian Murray (Tr. 1621)." Gov. Br. 13 (emphasis added).

This statement of the evidence is grossly distorted. It suggests that Julie admitted that she had a direct role in planting the death-inflicting bomb. The Court will search pages 1620 and 1621 of the transcript in vain -- and for that matter the entire record -- to find any support for this suggestion. Thus, the government's later conclusion -- that "there was clear and direct evidence linking . . . Julianne Busic to the live bomb that killed Officer Murray"^{4/} -- cannot withstand close scrutiny.

^{4/} Gov. Br. 29.

4. Failure to Differentiate Between Julie's Conduct and the Actions of Other Defendants on the Aircraft

In numerous instances, the government attempts to associate Julie with the allegedly unlawful or otherwise despicable conduct of her co-defendants. The government's blurring of these distinctions casts an unfavorable light on Julie which is supported by neither the government's citations to the record nor any other evidence at trial.

a. Carrying Pots on Plane

The government argues that Zvonko and Julie "carried in a shopping bag the iron pots which were used to make devices which they told the pilot and crew were real bombs (T. 2930)." Gov. Br. 24. While we assume the government meant to cite page 2938 of the transcript, Zvonko's testimony does not support the suggestion that Julie had any role in carrying the iron pots onto the plane. At that page, Zvonko merely indicated that the pots were gift wrapped and in a shopping bag. And Julie clearly testified on cross-examination that the only thing she carried on the plane was her purse. (T. 3680).^{5/}

^{5/} We are of course aware of the testimony of a passenger, Noreen Collins, that Julie had told her that Julie had carried explosives through security and onto the plane. (T. 4773). Julie denied any such role. (T. 3680).

b. Code Word

During the final phase of the hijacking in Paris, Zvonko told Captain Carey that he was awaiting a code word that his demands had been met. In its brief, the government states:

"During this period, the members of the hijacking team shared positions in the cockpit (T. 1591), and they began insisting that the code had not been received because their demands had not been met and their propaganda had not been published in various newspapers (T. 1591-1592)." Gov. Br. 10-11.

The referenced pages of the transcript do not support the insinuation that Julie had any knowledge about the code word or any part in dramatizing its supposed significance during the hijacking. Carey's testimony clearly indicates that he asked "Tyke [Zvonko] or Petar or any of the hijackers who might have been in the cockpit at the moment to help us get this code." (T. 1591-92). There is simply no suggestion that Julie was in the cockpit at that time. Since to our knowledge this is the only testimony on this specific issue, it cannot be said that Julie had any involvement with the code word on the airplane.^{6/}

^{6/} One particularly intemperate argument cannot pass without comment. In its "Statement of the Facts", the government offers the following:

(Footnote continued)

c. Terrorizing Passengers

On several occasions, the government directly suggests that Julie became irrational and/or participated in terrorizing the passengers. Thus, we are told the following:

"[T]he hijackers were apparently panicky, and acting so erratically. . . .

"'[M]embers of the hijacking team were in and out of the cockpit screaming and acting uncontrollably' (Tr. 1614).

* * * * *

"All of the sadistic threats to the passengers by Busic and the others were empty ones

* * * * *

"Captain Carey testified that at one point on the ground in Paris all of the hijackers panicked and for a brief period there was total mayhem" Gov. Br. 12, 14, 42 n.30.

(Footnote continued)

"Although it is difficult to prove, we believe that it was the death of Officer Murray, which was publicized, which delayed the code for which the hijackers were waiting so anxiously. Whoever had the responsibility of sending the message that would result in the surrender of the hijackers apparently realized the serious implications of Officer Murray's death, and decided not to send the code word." Gov. Br. 19 (emphasis added).

The government does not cite the record to support this theory. This is understandable since not one shred of evidence was offered in this regard. This statement represents nothing more than rank speculation by government counsel. Such unsupported conjecture has no place in appellate arguments.

To the extent that the government cites the record for any of these statements, the referenced transcript pages indicate beyond doubt that Julie was not engaging in any menacing activity. The government also neglects to mention that on cross-examination Captain Carey gave the following important testimony:

"[Q] Do you recall testifying yesterday that while you were on the ground in Paris members of the hijack team would come in and out of the cockpit shouting and using obscenities and acting uncontrollably, to use your phrase?

A Yes.

Q Do you recall that?

A Yes.

Q During that specific time, was Julie Basic doing any of those things you indicated?

A No, sir.

Q In fact, during the course of the flight, did she ever harass anyone?

A Not to my knowledge.

Q Ever shout at anyone?

A No, sir.

Q Ever use any obscenities to anyone?

A No, sir.

Q She didn't harangue anyone?

A No, sir.

Q In fact, Captain, wouldn't it be fair to say she was actually quite helpful and reassuring to anyone who had been harassed or harranged?

A Yes.

Q Wouldn't you agree she was fully unassuming or an unassuming person; would that be a fair characterization?

A Yes, sir, I agree.

Q One further point: Wouldn't it also be fair to say throughout the course of this flight she wasn't aggressive?

A . . . No, I would say no

Q By the way, did you ever see her carry any weapons?

A No, sir.

Q Did you ever see her carry any of the pot devices that you described?

A No.

Q Did you ever see her hold any of those pot devices?

A No.

Q There never came a time that she had any of that in her hand such as you described?

A No, sir.

Q Did she ever pretend she had a weapon of any kind?

A No.

Q Go through any motions simulating any kind of weapon or anything of that nature?

A No." (T. 1686-88).

The removal of this cloud over Julie's conduct aboard the plane is critical. In light of her defense, any credible suggestion that she was something more than a knowing spectator or that she terrorized passengers would be severely damaging. However, the undisputed evidence shows that this was simply not the case. As we described in our opening brief, "[a]ll her actions were devoted to promoting the welfare of the passengers. (T. 3460)." (Apps. Br. 16).^{7/}

II.

THE ADMISSION OF THE CONTENTS OF JULIE'S FLIGHT BAG WAS REVERSIBLE ERROR

Julie's trial attorneys moved to suppress the two library cards and the two diagrams of a Boeing 727 that had been seized without a warrant from a flight bag belonging to her. (App. 136). They argued that the consent to search extracted from Julie by the government, as well as her identification of the bag, had been involuntary. Despite government protests that the consent was not involuntary, Judge Bartels granted the

^{7/} The government also seeks to make much of Julie's supposed knowledge that the explosives on the plane were false because Zvonko had allegedly told her this when she confronted him about the "demand note" several days before the hijacking. Gov. Br. 21, 32, 42 n.30, citing T. 3678. The referenced transcript page is revealing. Julie testified that while she was "99 percent" certain that they were fake, she did not want to take the responsibility if she told the crew this and she turned out to be wrong (T. 3678-79).

motion. (App. 280).

The government then switched legal theories in an attempt to secure the admission of this crucial evidence. It tried to show that the seizure either took place incident to an arrest, or under exigent circumstances, or pursuant to an inventory search. This time the government was successful. While Judge Bartels found that the search and seizure did not take place incident to an arrest, he admitted the evidence, finding that it the search was justified because the FBI "had probable cause to believe that in the inventory of the handbags some dangerous explosives might be found" (App. 301).

On appeal the government does not defend Judge Bartels' ruling, or its position below, that the search and seizure was justified by exigent circumstances or as a routine inventory. Both theories are untenable. See Apps. Br. 25-32. Rather, the government has desperately thrown together a hodgepodge of new arguments in an attempt to salvage an improper ruling by the trial judge. The government now claims that (1) Judge Bartels' finding that the identification and consent to search were involuntary was based on a misreading of the law; (2) Julie had "abandoned" her flight bag and lost her privacy interest in its contents; (3) a search warrant was not required since the evidence would probably have been discovered anyway; and (4) the admission of the evidence was harmless error. That such a potpourri of arguments can be concocted in defense of an illegal

search and seizure is a tribute to the resourcefulness of government counsel. Nevertheless, under longstanding principles, the contents of Julie's handbag were improperly admitted into evidence and reversal is required.

1. Judge Bartels Correctly Ruled That
Julie Did Not Consent to the Search
of Her Flight Bag

The government seeks to demonstrate that Judge Bartels was wrong when he concluded that Julie did not voluntarily identify, or consent to the search of, her flight bag. It now claims that he "erroneously concluded that a consent to search is per se involuntary if obtained after a defendant has refused to answer any questions." (Gov. Br. 38). This attempt to avoid both the law and the facts must fail because Judge Bartels simply did not make the ruling ascribed to him by the government.

The law is settled that whether a consent to search is voluntary depends upon "the totality of the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); United States v. Mariani, 539 F.2d 915 (2d Cir. 1976). The circumstances of this case demonstrate that Judge Bartels was entirely correct in his conclusion that Julie's identification of her luggage, and her consent to its search, were involuntary.

At the time Julie signed the FBI's standard consent to search form and identified her luggage, she had been under arrest for at least 14 hours. (T. 82, 1622). She had been in FBI

custody for two and one-half hours and had already been strip-searched by one FBI agent and confronted by others. (T. 70, 71, 76-77, 78, 79, 82). Moreover, Julie was totally disoriented from exhaustion, having been awake from Friday through Sunday. (T. 74). In fact, while in FBI custody she passed out with her head resting on a desk. (Id.)^{8/}

After being advised of her rights, Julie asked for the aid of an attorney. She further said that she did not wish to talk with FBI agents in the absence of counsel. (T. 73, 79, 80). However, counsel was never provided. It was after her counsel request -- and the government's failure to act on it -- that Julie was asked to identify her luggage and consent to its search. (T. 80).

Taking all this evidence into consideration, Judge Bartels ruled that Julie's identification and consent were involuntary. (App. 280). His decision was obviously correct. The government simply did not meet its burden of proof. Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), cert. denied, 423 U.S. 842 (1975).

This Court has held that the voluntariness of the consent to search given by a defendant in custody is subject to "careful scrutiny". United States v. Wiener, 534 F.2d 15, 17

^{8/} The government cleverly describes this incident as "a nap." (Gov. Br. 34).

(2d Cir. 1976). Not only was Julie in custody, but she had already been subjected to a strip-search and was constantly in the presence of three FBI agents. Not only had she been awake for several days, but during this extended period of sleeplessness she had made two trans-Atlantic flights. And as anyone familiar with air travel can attest, two such flights are, in themselves, physically debilitating. The fact that both the identification and the consent occurred after Julie's request for counsel -- and the government's failure to abide by it -- also indicates that her actions were involuntary. Cf. Miranda v. Arizona, 384 U.S. 436, 474 (1966); Brewer v. Williams, 45 U.S.L.W. 4287 (U.S., March 23, 1977).

Thus, Judge Bartels' finding of involuntariness was justified. This conclusion was a question of fact for the trial judge and cannot be disturbed unless it was clearly erroneous. United States v. Tortorello, 533 F.2d 809, 815 (2d Cir. 1976); United States v. Miley, supra; United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977). It can hardly be characterized as clearly erroneous.

The government has mischaracterized Judge Bartels' ruling. It maintains that he did not decide on the basis of all the evidence presented, but merely focused on the fact that Julie was questioned by the FBI after her request for counsel was ignored. Significantly, there is no reference in the government's brief to such a ruling by Judge Bartels. There was

no such ruling.

Judge Bartels' finding that Julie's consent and identification were involuntary was contained in the following written opinion:

"Julienne Busic

This defendant was advised of her rights and after receiving the advice of rights form, she refused to sign it or to answer any questions until she had a lawyer. She was tired and, in fact, fell asleep. About one hour later she was asked to identify her luggage and did so and then signed a consent to search the same. The court finds that after she had refused to answer any questions or to sign the advice of rights form and had requested a lawyer, her subsequent identification of luggage and her waiver to search the same was involuntary and the results thereof will be suppressed." (App. 280).

The government's brief notwithstanding, this decision by the trial judge contains no discussion about per se rules of law. It contains an explicit factual finding of voluntariness. Indeed, it clearly refers to Julie's lack of sleep as a basis for the determination. As Judge Bartels stated in open court: "I think the conditions were such that her consent was involuntary." (T. 733). "I find she had not given consent." (T. 766). It is abundantly clear that Judge Bartels gave all the evidence the "careful scrutiny" required for a consent to search given while in custody. On the basis of this evidence, he made a proper factual finding, and it should not be disturbed.

2. Julie Did Not Abandon Her Flight
Bag Or Lose Her Privacy Interest
In Its Contents

The government claims for the first time that when Julie left the plane in France, she "abandoned" her flight bag and thus lost her privacy interest in its contents. (Gov. Br. 32). The government's argument is based primarily on the assertion that Julie was the "perpetrator" of a crime. (Id. at 35). The core of the contention appears to boil down to this: "Mrs. Busic surely abandoned any privacy interest in her handbag by leaving it on the premises in which she had been involved in a crime." (Gov. Br. 37) (emphasis added).

Of course, it is clear that Julie's arrest and subsequent trial are totally irrelevant to the question of whether she retained a privacy interest in her flight bag. In United States v. Chadwick, 45 U.S.L.W. 4797 (U.S., June 21, 1977), the Supreme Court unambiguously stated that searches of an individual's possessions "cannot be justified by any reduced expectations of privacy caused by . . . arrest." Thus, the governments' insistent reliance on Julie's involvement in the crime (whatever it may have been) is empty rhetoric.

Shorn of hyperbole, the issue is rather simple: When Julie left the aircraft to help bring the hijacking to an end -- and did not take her luggage with her -- did she voluntarily and intentionally relinquish her rights to the flight bag?

Whether an individual has abandoned property in the search and seizure context "is a question of intent." United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968); see also United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976); United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973). Moreover, it is clear that the property must be abandoned "voluntarily". United States v. Colbert, supra; United States v. Chamblis, 425 F. Supp. 1330, 1335 (E.D. Mich. 1977). The issue is

"whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." United States v. Colbert, supra, 474 F.2d at 174 (emphasis added).

Julie neither intentionally nor voluntarily surrendered any interest in her flight bag. It is uncontested that while the plane was in France, Julie had two arguments with Zvonko trying to persuade him to surrender. (T. 3467, 3471, 3614). But Zvonko was adamant in his refusal. Facing this crisis situation, Julie decided to leave the plane, phone New York, and bring the hijacking to an end. (T. 3625, 3629, 3632). When Julie left the plane, she was immediately arrested and taken into custody. Her luggage remained on board the aircraft. The undeniable fact is that Julie was forcibly separated from her flight bag by French authorities. At no time was there ever any indication that Julie intentionally

or voluntarily abandoned or relinquished any rights in her personal belongings.

In an attempt to avoid this stark reality, the government drops the following conclusory footnote:

"The fact that Mrs. Basic did not return to the plane because she was arrested does not detract from our argument." Gov. Br. 36 n.27.

To support this erroneous proposition, the government cites an irrelevant footnote from United States v. Parizo, 514 F.2d 52, 54 n.1 (2d Cir. 1975). This footnote indicates that a hotel guest may lose his occupancy of a hotel room, and his privacy interest therein, even if he fails to return to the room involuntarily. Thus, the government is claiming that "voluntariness" is not important to the issue of intentional abandonment. This Court in Parizo, however, made it abundantly clear that the right of occupancy was relevant only to the question of whether "the defendant had sufficient control over the premises to establish a right to privacy therein." 514 F.2d at 55. This Court made it equally clear that this question was entirely distinct from and "[p]reliminary to the inquiry into intentional abandonment by the defendant." Id.

There is no doubt that Julie had complete ownership of her flight bag, and the exclusive right of control over its contents. Since she had established a right to privacy in the bag, the only issue is whether she intentionally and voluntarily abandoned the privacy right. There is not a single fact in the record to support any such conclusion.

Finally, the government concludes its abandonment theory by arguing that Julie must have known that, upon leaving the plane, she was subject to arrest and therefore could not have had any expectation of privacy in the bag since she must have known that it would be searched after arrest. (Gov. Br. 37). Of course, this has nothing to do with the abandonment theory. And there is really no reason to suppose that Julie believed that, by leaving the plane to help end the hijacking, she gave up all property and associated privacy rights in her personal belongings. Moreover, since United States v. Chadwick, supra, 45 U.S.L.W. at 4801 n.10, made it clear that an actual arrest does not diminish privacy expectations in personal belongings, it would be absurd to conclude that a potential arrest would diminish such expectations.

3. The Warrantless Search of Julie's Flight Bag Was Improper Even If A Warrant Could Have Been Obtained

The government also argues for the first time on appeal that a warrantless search is proper where the search could have been conducted pursuant to a warrant, if one had been sought. (Gov. Br. 40-41). In making this argument, the government ignores the facts and contorts the law. It claims that "but for her consent", Julie's bag would have been searched with a warrant. Id. What the prosecution conveniently ignores, however, is the fact that Julie not only consented to the search involuntarily, but

also involuntarily identified the luggage.

Contrary to the government's assertion (Gov. Br. 39), Julie was not carrying a "ladies handbag" that could be identified as hers. She was carrying a flight bag which either a man or woman would be likely to own. See Gov. Exh. 37.^{9/} Nor is there anything in the record that demonstrates the FBI could show that the luggage in its possession belonged to any of the defendants.^{10/} Moreover, there was no testimony that the identity of the owner of the flight bag was detectable because of identification tags or other external markings. Thus, Julie's identification was crucial and obtaining a warrant without it would have been extremely difficult, if not impossible.^{11/} In fact, according to the best information available, the other bags -- those which Julie did not identify -- were never

^{9/} We have requested that government counsel make the flight bag available for this Court's inspection during oral argument.

^{10/} An FBI agent testified that a French officer told him that the luggage turned over to U.S. custody belonged to the defendants, but that he did not know how this information was obtained. The French officer did not say that he had obtained the luggage from the defendants. (T. 2427).

^{11/} Indeed, contrary to the government's post hoc, self-serving statements at oral argument on the hearing on the suppression motion (App. 394) and in this Court that "a search would in all likelihood have been made with a warrant" (Gov. Br. 41), the record strongly points to the contrary. We submit that the reason for the government's failure to obtain a search warrant -- when a magistrate was available (Gov. Br. 34 n.26) -- was the absence of probable cause for a warrant.

searched. (T. 777, 1334).

The government also incorrectly states the law. It relies primarily on United States v. Galante, 547 F.2d 733 (2d Cir. 1976), cert. denied ___ U.S. ___. In Galante the police sought and received a warrant for the contested search. However, the warrant was found to be defective. This Court allowed the admission of the evidence which had been seized pursuant to the warrant since the property could have been lawfully seized even without a warrant. The basis for this holding was the Court's desire to encourage the police to apply for warrants. It was only because a warrant was sought that the evidence in Galante was held admissible.

"A contrary holding would penalize the police for seeking a warrant, precisely what the Fourth Amendment commands. In this case, the warrant application was made in good faith; it was the understandable mistake of the magistrate in granting it that raises the possibility that the excellent police work involved here will go for naught. We are unwilling to hold that the police are placed in a weaker position when they attempt to comply with the demands of the Fourth Amendment than when they fail to do so." Id. at 740-41 (emphasis added).

Since the FBI failed to obtain a search warrant for Julie's luggage, Galante suggests that the evidence in this case should not have been admitted even if it might have been obtainable otherwise, because admitting the contested evidence would be a significant disincentive to securing a warrant. Police would be encouraged to force involuntary consents from defendants and

then, if the consent was later held invalid, to claim that a warrant could have been obtained. This would have the effect of reading the warrant requirement out of the Fourth Amendment.

The government also relies on United States v. Jarvis, 560 F.2d 494 (2d Cir. 1977).^{12/} In Jarvis the police made an arrest on a bench warrant after which palmprints and a photograph of the defendant were taken. The defendant claimed, and the court ruled, that the warrant was invalid because it did not describe the defendant with sufficient particularity. Nevertheless, the court, relying on Galante, refused to suppress the photo and palmprint since the officers, had they not relied on an invalid warrant, could have made a legal arrest and lawfully taken the two items. Id. at 498. In Jarvis, as in Galante, the officers obtained and relied in good faith on a warrant -- even though the same law enforcement ends could have been achieved without a warrant. This Court's position in Jarvis and Galante is clear. The police are to be encouraged to act through warrants, and, when they do so, evidence gathered pursuant to those warrants will not be unnecessarily suppressed. In this case, however,

^{12/} The government quotes some dicta from Leavitt v. Howard, 462 F.2d 992, 998 (1st Cir. 1972). (Gov. Br. 41). However, a close examination of Leavitt indicates the court was discussing only how the issue should be handled on habeas corpus. The First Circuit concluded only that before suppressing the illegal evidence "it would be well to be sure that the state court erred." Id. Leavitt simply has nothing to do with the case at hand.

the police failed to obtain a warrant -- even though they admit that a judicial officer was available. (Gov. Br. 34 n.26).

Contrary to the prosecution's contention, the contents of Julie's flight bag probably would not have been discovered "but for" her involuntary identification of the bag and her involuntary consent to search it. Moreover, even if it could have been discovered without her identification and consent, the police were still required to secure a warrant. The government's argument that the police can avoid the warrant requirement here by relying on Julie's forced consent must be soundly rejected.

4. United States v. Chadwick Requires
The Exclusion of the Contents of
Julie's Flight Bag-----

In a single-paragraph footnote, the government makes a desperate attempt to avoid the clear holding of United States v. Chadwick, 45 U.S.L.W. 4797 (U.S., June 21, 1977). It argues that since Julie's bag could have been searched as an incident to arrest if it had been in her possession, it could be lawfully searched even though it was not in her possession. (Gov. Br. 38 n.28). This is patent nonsense. The argument totally ignores the settled principle that a warrantless search incident to an arrest is permitted only in order to prevent a defendant from "gain[ing] possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). Since the bag

was not within Julie's "immediate control", these possibilities did not exist and the warrantless search was plainly improper. Id.

"[Where] there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." United States v. Chadwick, supra, 45 U.S.L.W. at 4801.

The government must also deal with the fact that the actual search did not take place until sixteen hours after the arrest, something strictly forbidden by Chadwick. Since it cannot explain away this uncontrovertible fact, the government argues that Chadwick is not retroactive. (Gov. Br. 38 n.28). This contention totally misses the mark. This is obviously not a case involving the issue of retroactivity. At trial the government argued that the contested search was incident to an arrest, and the Circuit Court opinion in Chadwick (532 F.2d 773 (1st Cir. 1976)) was thoroughly discussed and considered. In fact, government counsel brazenly predicted that the Supreme Court would reverse Chadwick.^{13/} Nevertheless, Judge Bartels explicitly rejected the "search incident to arrest" justification for this search. (App. 300-01). We are therefore not asking this Court to reverse a finding of the trial court on the basis of a newly decided case.

^{13/} See Letter from Edward R. Korman to Judge Bartels, dated March 23, 1977.

Moreover, the government's retroactivity argument is based on United States v. Reda, No. 77-1062 (2d Cir., Oct. 12, 1977) (on rehearing) where the Chadwick issue was first raised, not even on appeal, but on rehearing. The obvious "burden on the administration of justice" that would have been caused by a retroactive application of Chadwick in such a situation is obvious. United States v. Reda, supra, slip. op. at 6237. There is no similar concern here. Chadwick was raised at trial and, at least as it relates to the government's "search incident" theory, its reasoning was followed by the trial court. It has also been raised on appeal in a timely fashion. Thus, the government's attempt to avoid the clear holding of Chadwick must fail.

5. The Failure To Exclude The Contents
Of Julie's Flight Bag Is Reversible Error

The government has admitted "characterizing the evidence seized from Julianne's handbag as significant." (Gov. Br. 47). It has also admitted that to suggest that its admission was harmless error "may seem somewhat contradictory." Undaunted by these awesome concessions, the government nevertheless makes a stab at a harmless error argument. It is painfully obvious that the government is merely going through the motions.

The government's position rests upon two totally erroneous propositions: (1) the case against Julie, without the contested evidence, was "overwhelming", and (2) the seized evidence would have been admissible anyway.

The case against Julie was far from overwhelming. See Apps. Br. 13-19. If it had been, this case would never have required six weeks and 49 witnesses to try.^{14/} In its attempt to make its case seem more powerful on appeal than it was at trial, the government has distorted the record in material respects. See pages 2-16, supra. It claims that Julie "obviously participated in the hijacking." (Gov. Br. 42). This is simply not the case. The question of her participation was heatedly contested and certainly was not clearcut. (See, e.g., T. 2887-88, 3055, 3460, 3467, 3470-71, 3498, 3547-3602, 3606-07, 3614). The government also claims that "contrary to a statement in her brief, unaccompanied by a reference to the record, there was no testimony 'from several witnesses' that she attempted to persuade Zvonko Basic to surrender." (Gov. Br. 42). This statement is also a misrepresentation. As appellants' brief demonstrated (pages 15-16), three witnesses at trial testified about Julie's confrontations with Zvonko. (See T. 3055, 3467, 3471, 3614).

The government also states that

"even the passenger who testified that at one point, while the plane was on the ground in Paris, Mrs. Basic appeared 'as frightened and terrorized as the rest of us' (Tr. 3470); had

^{14/} The jury deliberations alone took two and one-half days. See Apps. Br. 5.

no doubt that she was a willing participant in the hijacking (Tr. 3472)." (Gov. Br. 42)
(emphasis added; footnote omitted).

In the omitted footnote, the government states that Julie's fright "was due to the fear of an assault on the plane by the French" (Gov. Br. 42 n.30). But the record makes perfectly clear that the witness (a passenger named Walter F. Rush) was referring to Julie's fear of other hijackers. (T. 3468-3470). Moreover, Mr. Rush did not testify, as the government asserts, that he had "no doubt Julie was a willing participant". Rather he said that it "seemed" like Julie was a hijacker "at first", but that her heart wasn't in it. (T. 3472)^{15/}

The acid test of the importance of the contested evidence is the use to which the government put it. The evidence was introduced in the government's case-in-chief. (T. 2454). The prosecutor argued that the evidence was sufficient to overcome Julie's motion for a directed verdict (T. 2569), and he confronted her with it during cross-examination. (T. 3682-84). Moreover, he discussed this evidence during summation five times -- more than any other piece of evidence or testimony. (T. 5341, 5371, 5392, 5445, 5763). The government has also conceded in this Court that

^{15/} Another passenger, Geanne Thelwell, unequivocally testified that as passengers left the plane in Gander, Newfoundland, Julie looked at her and said "I wish I could get off with you." (T. 3489).

the library cards taken from Julie's flight bag "led the F.B.I. to the main branch of the New York Public Library and to Jane's All The Worlds Aircraft." (Gov. Br. 33; see also id. at 39). The significance of this "fruit" of the illegal search is amply demonstrated by the way the government describes it.

"Moreover, fingerprints of Mrs. Basic were also found in a 1974-1975 volume of Jane's in the New York Public Library (Gov. Ex. 42). The part of that book containing the information of Boeing 727s, commencing on page 281 had been torn out. Julianne's fingerprints were on eight different pages of the volume (Tr. 2518); one of those was page 808, in the index. Approximately two thirds down the page was 'the "M" section of the index, model 727 (Boeing) and it indicates that that material on the 727 is on page 281' (Tr. 2519)." (Gov. Br. 33-34) (footnotes omitted).

The truth is obvious. As the government's fatal concession indicates, the illegally seized evidence has been, and continues to be, "significant" to the government's case against Julie. Its admission was reversible error.

Citing Harris v. New York, 401 U.S. 222 (1971), the government also claims that Julie "could have been cross-examined about" the illegally seized Boeing diagram and the fruits of the unlawful search, her fingerprints on the library books. (Gov. Br. 43). This argument is untenable. First, as a matter of settled law, the illegally seized evidence and its fruits could not have been used here in cross-examination. See Agnello v. United States, 269 U.S. 20 (1925); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974). Second, even if the evidence could

have been used in cross-examining Julie, it would have been reversible error absent an instruction strictly limiting its use to impeachment of the witness and not as evidence of guilt. Harris v. New York, supra, 401 U.S. at 223. Since the government used the evidence affirmatively in its case-in-chief, and no limiting instruction was given, the jury undoubtedly used it for an improper purpose -- as evidence of guilt.

Finally, the government contends that Julie's and Zvonko's testimony on direct examination about the New York Public Library would have led to Julie's fingerprints in Jane's even without the seizure of the library cards from the flight bag. (Gov. Br. 43). Of course, had the library cards not been wrongfully introduced into evidence during the government's case, there would have been no need for any testimony about the library. The appellants' testimony about the library was a classic fruit of the government's earlier introduction of the illegally-seized evidence.

The contents of Julie's flight bag were wrongfully introduced into evidence. The error of the trial judge was clearly not "harmless beyond a reasonable doubt". Chapman v. California, 386 U.S. 18, 24 (1967). Julie's conviction must be reversed.

III.

THE TESTIMONY OF DR. DIAMOND WOULD HAVE HAD A DIRECT BEARING ON ZVONKO BUSIC'S DEFENSE AND WAS ADMISSIBLE

The government advances two basic arguments against the admission of Dr. Diamond's testimony. It claims that the testimony was somehow scientifically lacking and that it was irrelevant. Neither position is supportable.

The main thrust of the government's attack on Dr. Diamond's testimony is that it "was admissible only if a defendant's belief that hijacking was morally right is a defense to aircraft piracy". (Gov. Br. 47). Since the government concludes that such a belief is not a defense, it has no difficulty in concluding further that Dr. Diamond's testimony was inadmissible. Of course, the issue never was, and is not now, what the government claims it to be. Zvonko Basic's position has been completely misstated. We have never contended that a belief that hijacking is morally justified constitutes a defense to aircraft piracy. Rather, we have simply argued that because of his "abnormal mental condition" Zvonko was incapable of acting with "wrongful intent" as required by statute.

The issue, then, is whether Zvonko was wrongfully denied the opportunity to present a defense based on his "mental

condition".^{16/} A "mental condition" defense is permissible when it tends to show that the defendant lacked "the specific mental state required for a particular crime." United States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972); see also, United States v. Bennett, 539 F.2d 45, 52-53 (10th Cir. 1976); United States v. Demma, 523 F.2d 981, 986-87 (9th Cir. 1975). The government concedes that "wrongful intent" is the equivalent of "willfullness", i.e., the voluntary, intentional violation of a known legal duty. (Gov. Br. 48). Since "willfullness" is synonymous with a specific intent to break the law,^{17/} Zvonko should have been allowed under Brawner to present Dr. Diamond's testimony to show that he was incapable of forming that intent. The District Judge refused the admission of this testimony because he thought "wrongful intent" was a "general" intent rather than a specific intent requirement. (App. 513). He was plainly wrong and Dr. Diamond's testimony should have been admitted.

^{16/} Contrary to the government's argument (Gov. Br. 48), the fact that Zvonko read the aircraft piracy statute is irrelevant. The pertinent question is whether his mental condition was so abnormal that, despite this reading, he was unable to form the requisite intent. See Apps. Br. 37.

^{17/} See, e.g., Devitt & Blackmar, Federal Jury Practice and Instructions, § 14.03 (3d ed. 1977); see also United States v. Bessesen, 445 F.2d 463 (7th Cir. 1971), cert. denied, 404 U.S. 984; United States v. Weiler, 458 F.2d 474, 475 (3d Cir. 1972).

The government also objects to the content of Dr. Diamond's testimony, although the reasons for the objection are not clear.^{18/} In a letter made available to the court, Dr. Diamond's professional opinion was comprehensive and focused directly on Zvonko's ability to form a "wrongful intent".

"Taking into consideration Zvonko Basic's lifelong social and cultural indoctrination, the social and political circumstances of his childhood and adolescence, his total preoccupation with the Croatian cause, the belief in the reality threat to his own life, and his obsessive and fanatical determination to perform one last act of value to his people, it seems clear to me that he lacked the mental ability to make the choice or decision to do other than what he did do. In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvonko Basic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice." See Apps. Br. 35; Appendix B at 3-4 (emphasis added).

Moreover, in a deposition which was also presented to the court, Dr. Diamond said: "I believe that he was unable to appreciate or understand the wrongfulness of his acts." (App. 504). If the jury ultimately agreed with the opinion of this distinguished psychiatrist, it could conclude that Zvonko could not intentionally

^{18/} At one point the government seems to argue that Dr. Diamond should have discussed the defendant's legal theory. "[T]here was nothing in Dr. Diamond's letter which suggested why his conclusion would provide Mr. Basic with a defense to air piracy, but not interference with the flight crew." (Gov. Br. 45). It is a mystery why the government feels this type of legal discussion should be undertaken by a psychiatrist.

violate a known legal duty and he was thus incapable of acting with "wrongful intent" or committing aircraft piracy.

The government's final claim is that Dr. Diamond's testimony was not grounded in "scientific support." (App. Br. 50). However, we are never given the basis for this claim. Dr. Diamond is a world-renowned expert in both law and psychiatry. He is a professor on the law, medical and criminology faculties at the University of California at Berkley. (See App. Br., Appendix A). He clearly relied upon information "of a type reasonably relied upon by experts in [his] field" United States v. Cyphers, 553 F.2d 1064, 1072 (7th Cir. 1977); see also App. Br. 38-39 n.19. Not even Judge Bartels found any fault with the content of Dr. Diamond's proposed testimony.

If allowed to testify, Dr. Diamond would have presented competent psychiatric testimony about Zvonko's mental condition and its relation to his ability to form a "wrongful intent". This testimony would have been directly relevant to the question of whether an essential element of the crime of air piracy -- the mental element -- was present. However, Zvonko never had a chance to present to the jury this evidence on the critical issue of "wrongful intent". This fundamental deprivation requires reversal and a new trial.

IV.

THE DISTRICT COURT ERRED IN DENYING THE APPELLANTS'
REQUEST FOR A CHARGE ON A LESSER INCLUDED OFFENSE

The government claims that no instruction on the lesser included offense of interfering with a flight crew was necessary because (1) both that offense and aircraft piracy have the same intent requirement and (2) there was no rational basis for the jury to find either Zvonko or Julie innocent of aircraft piracy, but guilty of interference with the flight crew. These arguments are plainly without merit.

A. Aircraft Piracy Has A Different Intent
Requirement Than Interference With A Flight Crew

The crime of aircraft piracy explicitly requires that the seizure of an aircraft be committed with "wrongful intent". 49 U.S.C § 1472(i). The crime of interference with a flight crew carries no such intent requirement. 49 U.S.C. § 1472(j). The government argues that this clear statutory distinction is meaningless and that the intent requirement for each crime is identical. For this proposition it relies on Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960), stating that this case held that "a deliberate violation of a known legal duty [i.e., willfullness], is required" unless the penalty is small and several other conditions are met. (Gov. Br. 52).

The first flaw in the government's argument is that Holdridge does not even remotely say what it is purported to say.

That case stands for the proposition that when a criminal statute is enacted

"where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where the congressional purpose is supporting, the statute can be construed as one not requiring criminal intent." Holdridge, supra, 282 F.2d at 310 (emphasis added).

Holdridge therefore means that where a statute meets these conditions, no intent of any kind is required. The case discusses strict liability offenses. See Apps. Br. 39-40.

If these conditions are not met, the crime must have some type of intent requirement. There are two levels of criminal intent. One level requires "purposeful" conduct -- an intent to do the act which is unlawful. The second level requires "willfull" conduct -- an intent to break the law. United States v. Weiler, 458 F.2d 474 (3d Cir. 1972); United States v. Moore, 435 F.2d 113, 115 (D.C. Cir. 1970), cert. denied 402 U.S. 906 (1971); United States v. Pomponio, 429 U.S. 10 (1976). (See Apps. Br. 40-41). The government is clearly wrong when it insistently claims that all serious crimes have the same requirement of "willfullness".

The second flaw with the government's argument is that it completely ignores the case law that has developed around 49 U.S.C. § 1472. Subsection (l)(1) of this statute makes it a federal crime to carry a concealed weapon aboard an aircraft. Like subsection (j), which forbids interference with a flight crew,

subsection (1)(1) makes no reference to intent. Two courts of appeals have found that subsection (1)(1) requires not that the defendant intentionally violate a known duty, but only that the defendant intend the act which is unlawful -- i.e., a general intent. United States v. Lee, 539 F.2d 606 (6th Cir. 1976) (McCree, J.); United States v. Flum, 518 F.2d 39, 44-45 n. 10 (8th Cir. 1975), cert. denied, 423 U.S. 1018 (1975). It is obvious that subsection (j) should be interpreted in the same way as subsection (1) since they are both drafted without a reference to intent. Thus, in United States v. Meeker, 527 F.2d 12 (9th Cir. 1975), the Ninth Circuit ruled that:

"We therefore construe section 1472(j) as a general intent crime, in harmony with the statutory purpose of safeguarding flight personnel from any statutorily described acts which would interfere with their efficient functioning." 527 F.2d at 14.

The Meeker court meant not only that the statute did not require a specific intent to interfere with a flight crew, but also that it did not require willfullness -- i.e., the specific intent to break the law.

The government has conceded that air piracy requires "willfullness". Both the statute and the cases show that interference with a flight crew does not require "willfullness". Therefore, the two crimes cannot be said to have the same intent requirement.

B. The Jury Could Have Found Zvonko Busic
 Innocent Of Aircraft Piracy Yet Guilty
 Of Interference With A Flight Crew

The government claims that since Zvonko read the aircraft piracy statute, he must have acted with "wrongful intent". (App. Br. 51). However, this assertion ignores Zvonko's "abnormal mental condition" defense. If the jury believed that because of his "abnormal mental condition" Zvonko could not have voluntarily and intentionally violated a known legal duty, it could acquit him of aircraft piracy since that crime requires a "wrongful intent". Yet, at the same time, the jury could have found Zvonko guilty of interfering with a flight crew, an offense which does not require "wrongful intent" but only that the proscribed acts themselves be voluntary. Since Zvonko could reasonably have been acquitted of the more severe offense, and convicted of the lesser offense, he was entitled to an instruction on the lesser offense. The failure to give the critical charge is reversible error.

C. The Jury Could Have Found Julie Busic
 Innocent Of Aircraft Piracy Yet Guilty
 Of Interfering With A Flight Crew

In the opening brief, we argued that, on the evidence before it, the jury could have acquitted Julie of aircraft piracy, yet convicted her of interfering with a flight crew. (Apps. Br. 49). The government's response demonstrates that it does not appreciate the purpose of a lesser included offense charge. The government states:

"Of course, this argument ignores the verdict of the jury. A jury which believed that Mrs. Basic had no intention to hijack the aircraft would not have convicted her of the more aggravated offense of air piracy resulting in death (under the instructions given by the trial judge), or of conspiracy to commit air piracy. Accordingly, even if the lesser included instruction on interference with a flight crew should have been given, the verdict returned by the jury shows that the error was harmless." (Gov. Br. 53) (emphasis added).

The reason a jury must be given an instruction on a lesser included offense is to prevent it from convicting a defendant of an "aggravated" offense where the evidence may not warrant it -- but where the jury nevertheless believes that the defendant has committed some offense. Juries may not lawfully be placed in the intolerable position, as the government concedes happened here, of being forced to "either credit her testimony and acquit her of every offense or convict her of everything." (Gov. Br. 54). The Supreme Court has unambiguously rejected the Hobson's choice argument urged by the government.

"True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212-13 (1973) (emphasis added).

Finally, the government meekly protests that it does not understand how Julie could not intend to hijack the aircraft but thereafter could have interfered with the flight crew. It notes that Julie has asserted "her intent while on the plane was to help the passengers and flight crew." (Gov. Br. 54). The government need not be so perplexed. Julie did not intend, at any time, to seize the aircraft or to interfere with the flight crew. Her lack of intent to break the law means that she cannot be convicted of aircraft piracy because an intent to break the law is an essential element of that crime. However, her lack of an intent to break the law does not foreclose the possibility of a conviction for interfering with a flight crew. "Interference" has a lesser intent requirement than aircraft piracy. It is only necessary that the acts which are unlawful -- the acts which interfere with the crew -- be intentional acts. It is not required that the defendant intend to break the law. Julie's actions aboard the plane -- for example, talking with passengers, handing out leaflets, walking up and down the aisle -- could have had the effect of intimidating and interfering with the flight crew.^{19/} If the jury so concluded, it could find her guilty of the lesser offense -- even though her intentions were lawful.

^{19/} The intimidating effect could also have been produced by Julie unintentionally giving the appearance that she was part of the hijacking team.

Julie could have been acquitted of aircraft piracy, but convicted of interference with a flight crew. She was therefore entitled to a lesser included offense instruction. The failure to give this critical charge requires reversal.

V.

THE APPELLANTS PROPERLY OBJECTED TO PREJUDICIAL
REMARKS IN THE PROSECUTOR'S CLOSING ARGUMENT

The government has set forth in twenty pages its response to the argument that Julie was denied a fair trial by egregious judicial and prosecutorial misconduct. We are content to rest upon the arguments made in our opening brief and this Court's review of the record. Nevertheless, we are obliged to respond to two serious misstatements by the government concerning whether the appellants properly objected to prejudicial remarks in the prosecutor's closing argument.

The government opens its defense of the prosecutor's closing argument with the following statement:

"Although page after page of improper comments are now alleged by Mrs. Basic, the summation was not interrupted once by an objection. This was not because there was agreement by 'all sides' that there would be no objections during summations, as the Pesut-Matanic brief (p. 42) suggests (Tr. 5252-5254), but because they chose to sit by and say nothing in the hope that the prosecutor would say something that would taint the conviction that was inevitable." (Gov. Br. 65) (footnote omitted).

This contention is absolutely untrue, and the government knows it.

Prior to the commencement of closing arguments, Judge Bartels and all counsel huddled at the bench to discuss the procedure for making objections during closing argument. (T. 5251-54). Zvonko's counsel stated that it was

"my practice when I have an objection to remark in summation by my opponent, unless it is really something that goes beyond the beyond, I try to save it until he's finished." (T. 5253) (emphasis added). 20/

Zvonko's counsel reiterated that counsel would "[w]ait until he finishes and then let the Court rule on it." (T. 5254). Judge Bartels approved the agreement with the observation "[t]hat is a far better way."^{21/} Any possible doubt about the agreement is dispelled by counsel's reiteration of the original understanding during a break in the prosecutor's closing argument. (T. 5401).

20/ In its brief the government cites only half of Mr. Tigar's statement ("goes beyond the beyond") and neglects to point out that in the same sentence Mr. Tigar made it abundantly clear that there was an agreement not to make objections during summations. See Gov. Br. 65 n.42.

21/ When the prosecution violated this agreement by interrupting the closing argument of Pesut's counsel, Judge Bartels admonished the prosecutor and told him to abide by the original agreement.

"The defendants restrained themselves until Mr. Schlam was finished. So I will ask Mr. Schlam to refrain [sic] himself until the defendants are finished and then he can make his objections after they are finished, or after Mr. Rochman is finished All right. Now, Mr. Schlam, therefore, you wait." (T. 5495).

The government also charges that, as for the challenged statements by the prosecutor, "most" of them were never the subject of an objection. (Gov. Br. 66). This is simply false. As the following list of examples indicates, Julie's trial counsel objected to a host of the prosecutor's closing remarks.^{22/}

The e included:

(1) Julie introduced the flight steward to the hijackers.^{23/} (T. 5457).

(2) Julie admitted that she knew about the bomb. (T. 5458).

(3) The prosecutor's violation of the judge's limiting instructions concerning Zvonko's alleged statement to the FBI agent about Julie's knowledge of explosives and the bomb. (T. 5459-61).

(4) Zvonko implicated Julie as a matter of law. (T. 5462).

(5) Julie did not offer a defense. (T. 5463).

^{22/} The trial court indicated that the objections noted by counsel would be deemed to have been adopted by all defense counsel. Moreover, the objections of Zvonko's counsel were noted prior to those of Julie's. (T. 5449-56).

^{23/} This exaggeration was so improper that Judge Bartels instructed the jury that the evidence did not support this statement. (T. 5480).

(6) Julie Basic thinks the jury is stupid.
24/
(T. 5464).

We acknowledge that a few of the prosecutor's prejudicial comments went undetected at trial. These include his charges that Julie was "manipulative", "playing cute", refused to make admissions, gave "nonsensical" and "ridiculous" explanations, and tried to "score a point with the jury". (Apps. Br. 62). Trial counsel's failure to object is not significant and is understandable. First, these types of arguments are similar to those categories listed above to which counsel objected. Second, the prosecutor's closing argument consumed five and one-half hours and runs for approximately 160 transcript pages. It is therefore not surprising that a few remarks would be lost in the shuffle. Finally, the trial judge was obviously anxious to proceed with defense counsel's summations, and he did not allow defense counsel an opportunity to review the transcript or to take an adequate recess to formulate objections.

CONCLUSION

For the reasons stated in the appellants' opening brief and this reply brief, we respectfully request that the convictions

24/ Judge Bartels instructed the jury that the prosecutor's argument that Julie's defenses were "an insult to your intelligence" was improper. (T. 5441).

of Zvonko Basic and Julie Basic be reversed.

Respectfully submitted,

MICHAEL E. TIGAR
PIERCE O'DONNELL
1000 Hill Building
Washington, D.C. 20006

Of Counsel:
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D.C. 20006

Attorneys for Defendants-
Appellants Zvonko Basic
and Julie Basic

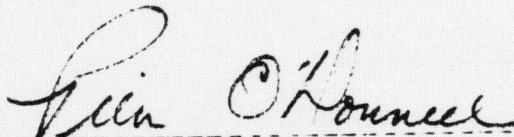
Dated: Decmeber 2, 1977

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY BRIEF FOR APPELLANTS ZVONKO BUSIC AND JULIENNE BUSIC was served by depositing copies in the United States Mails at Washington, D. C., first class postage prepaid, this 2nd day of December, 1977, addressed to the following:

Hon. Edward R. Korman
Chief Assistant United States Attorney
Eastern District of New York
Federal Building
225 Cadman Plaza East
Brooklyn, New York 11201

Paul B. Bergman, Esq.
Ford Marrin Esposito Witmeyer & Bergman
Cunard Building
25 Broadway
New York, New York 10004


PIERCE O'DONNELL